

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

*Oreg. & affidavit
by mailing*
77-1160

To be argued by
CHERYL M. SCHWARTZ

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1160

UNITED STATES OF AMERICA,

Appellee,

—against—

WILLIAM M. RUFFIN,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

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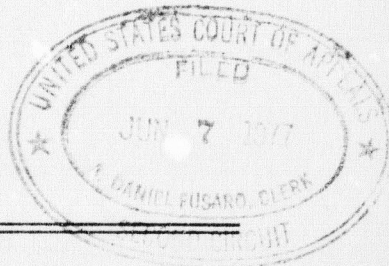


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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1160

UNITED STATES OF AMERICA,

Appellee,

—against—

WILLIAM M. RUFFIN,

Appellant.

BRIEF FOR THE APPELLEE

Preliminary Statement

William Ruffin appeals from a judgment of the United States District Court for the Eastern District of New York (Pratt, J.) entered on March 3, 1977, convicting him, following a jury trial, of evading income taxes by filing a false and fraudulent individual income tax return for 1972 (Count IV) and false and fraudulent corporate income tax returns for 1970 and 1971 (Counts VII and VIII), in violation of Title 26, U.S.C., § 7201, as charged in an eleven count indictment.¹

¹ The jury found defendant not guilty on Counts II and III, and the court declared a mistrial as to the remaining six counts after the jury had deliberated for about twelve hours. Although the jury had not declared itself "hung", the Government and the defendant agreed to accept a partial verdict.

Appellant received a \$5,000 fine and was given concurrent sentences of 3 years imprisonment, to serve 2 months, balance suspended, with 2 years 10 months probation. Appellant is free on bail pending appeal.

Appellant presents various claims on appeal: (1) that statements that he made to IRS and to the grand jury should have been suppressed and the indictment dismissed because of the lack of "target" warnings to him in the grand jury; (2) that there was insufficient evidence to support the convictions; (3) that the court erred in its charge on willfulness and on knowledge of the contents of the returns; (4) that the court erroneously excluded certain proposed defense expert testimony; and (5) that certain evidence was erroneously admitted.

Statement of Facts

A. The Suppression Hearing

In early 1975, a Special Grand Jury sitting in the Eastern District of New York was investigating misuse of funds, *inter alia*, by Bedford-Stuyvesant Youth-in-Action, a federally funded anti-poverty program operating in Brooklyn (H. 19-20).² In connection with this investigation, defendant Ruffin was subpoenaed to produce on March 7, 1975, records pertaining to leases for the rental of 1402 Bedford Avenue, entered into between either himself as an individual or his corporation, Rugore

² Numbers in parenthesis preceded by "H." refer to hearing transcript pages. Numbers preceded by "T." refer to the trial transcript. Numbers preceded by "G.J.I." refer to the grand jury transcript of March 7, 1975. Numbers preceded by "G.J.II." refer to the grand jury transcript of the first appearance on March 14, 1975; those preceded by "G.J.III." refer to the grand jury transcript of the second appearance on March 14, 1975.

Associates ("Rugore") and the Bedford-Stuyvesant Community Corporation Young Mothers Program (H. 20-21). Although neither the defendant nor Rugore Associates was a target of the grand jury's investigation and the defendant had merely been called as a witness, before being questioned by the Assistant United States Attorney, he nonetheless was advised of his right to counsel and his right not to incriminate himself. (H. 25, G.J.I. 23).

During extensive questioning before the grand jury about the rental of 1402 Bedford Avenue, which was leased for five years but never occupied, Ruffin acknowledged that he had received rental income of about \$30,000 annually from the anti-poverty program. After producing certain of the subpoenaed documents, Ruffin was asked about the corporate books and records, including whether the corporation had filed income tax returns (G.J.I. 17). The questioning revealed that the corporation had last filed a return in 1971 (G.J.I. 17; H. 27). After several intervening questions, Ruffin was asked whether he had declared the rental income on his personal returns, and he stated that he had not (G.J.I. 21; H. 27). At the end of the questioning, he was asked to return in a week and to bring additional documents (G.J.I. 32-34).

On March 14, 1975, Ruffin appeared again before the grand jury and was advised for the second time that he had a right to counsel and that he had a right not to incriminate himself (G.J.II. 2-3). He stated he could not afford an attorney because the one he wanted charged \$50.00 an hour, and he could not afford that (G.J.II. 3). After questioning him concerning only corporate documents and transactions, the Assistant United States Attorneys took him before the miscellaneous judge so that he could request court-appointed counsel. He was found to be ineligible and returned to the Grand Jury where he continued to answer questions about his transactions with

the Young Mother's Program. Although he was not specifically told he was a target of the Grand Jury's investigation since, in fact, he was not, he was told on March 14, by one of the Assistant United States Attorneys who was going to question him in the grand jury, that he had a "tax problem." (H. 30-31). Moreover, he was warned, "in fairness to you . . . in answering these questions, you may be implicating yourself in violation of the Federal law" (G.J.III. 3). He indicated that he understood that possibility and would continue to testify voluntarily (G.J.III. 3).

After his March 7 appearance, one of the Assistant United States Attorneys present in the grand jury notified the Internal Revenue Service ("IRS") of the likelihood of a failure to report income by the defendant (H. 51). Pursuant to a Rule 6(e) order, Fed. R. Crim. P., the grand jury minutes and exhibits were turned over to IRS (H. 51). On July 14, 1975, a Special Agent of the IRS read, for the first time, the grand jury testimony and reviewed the exhibits (H. 51). On November 4, 1975, the defendant met with IRS agents, for the first time, to discuss his failure to file corporate income tax returns and to report income on the corporate and personal income tax returns that he had filed. As of that date, no decision had been made to recommend prosecution for any criminal violations of the Internal Revenue Code (H. 64-65).

On June 30, 1976, the defendant was indicted on six counts of personal income tax evasion, two counts of corporate income tax evasion and three counts of failure to file corporate income tax returns.

At a pre-trial hearing held on December 9, 1976, defendant moved to suppress his statements before the

grand jury and his November 4, 1975, statement to the IRS agents.

Defendant claimed that he had no idea that he might be prosecuted until November 11, 1975,³ when he was so informed by the United States Attorney's Office (H. 104). By that date, he already had testified in the grand jury and met with IRS agents. He did state, however, that he had known he could retain a lawyer but did not do so (H. 102). The grand jury minutes reflect that he indeed had consulted with a lawyer but had not retained him (G.J.II. 3). The court denied defendant's motion, finding that he had not been a target of the grand jury on March 7, 1975, the date of his first appearance; that he had been thrice advised of his rights before the grand jury; that defendant was aware on March 14, 1975, that he might be the subject of criminal proceedings; that the government had not sought to trap the defendant in any way and had only fortuitously uncovered the evidence relating to his tax violations in the course of investigating another target and that the Government could have developed a tax case independently (H. 124-127).

In any case, the Government did *not* offer into evidence at trial the statements defendant sought to suppress.

B. The Government's Case

(1) During the course of the grand jury investigation into the federally funded anti-poverty programs, testimony revealed that one of the groups, the Young Mothers Program, had leased a building for almost five

³ Contrary to the implication in appellant's brief at page six, appellant was not directed to appear at the United States Attorney's Office without counsel.

years for approximately \$30,000 per year. Although the Young Mothers Program had paid almost \$150,000 in rent, it had never occupied the building. Further investigation established that the first lease was signed by William Ruffin as lessor and thereafter by Rugore Associates, Inc., by William Ruffin, president, as lessor. However, all of the rent checks were payable to William Ruffin as an individual. The amounts received were not reported as income on either Ruffin's individual income tax return for 1969-1974 or Rugore's corporate income tax returns for 1970 and 1971. No income tax returns were filed for Rugore for 1972-1974.

(2) During the years in question, 1969 through 1974, defendant was employed by the United States Postal Service to purchase and lease real property for the postal service (T. 406, 562). In addition, he previously had taken graduate courses in real estate taxation and owned rental property (T. 554-555, 562-3). He also participated in community affairs, including a group known as Community Sponsors, which had been formed to work with an unwed mother's program (T. 412-413, 419).

The Community Sponsors Young Mothers Program, a delegate agency of the federally-funded Bedford-Stuyvesant Youth-in-Action Community Corporation, was established during the war on poverty to assist unwed mothers to complete their education (T. 15-17, 38). The Young Mothers Program could not purchase property and had to rent its facilities (T. 16). In 1968, the director of the program found a building at 1402 Bedford Avenue, Brooklyn, New York, which she determined could be used for certain facilities of the program, and she approached the defendant for help in making the building available to the program (T. 101-106). Defendant then purchased the property in his own name (T. 107) and in

October 1968 entered into a rental agreement with the Young Mother's Program (T. 18, 45), providing for an annual rental of approximately \$30,000 (T. 46). The lease was renewed three times, at approximately the same rent, through 1974.⁴ (Tr. 50, 55, G's Ex. 1, 2, 3, 5).

In March 1968, the corporation, Rugore Associates, Inc., was established by defendant. Ruffin was president and sole shareholder (T. 527). In March 1969, defendant set up a checking account in his own name at King's Lafayette Bank (T. 133). In September 1969, defendant transferred title of the property 1402 Bedford Avenue to Rugore (T. 230-231). In October 1969, defendant opened a savings account in his own name at the Brooklyn Savings Bank (T. 137).

During this entire period of time, from 1969 to 1974, the Young Mothers Program gave defendant numerous checks for rent made payable to "William Ruffin"; defendant acknowledged receipt of these checks by signing rent receipts in his individual capacity. (T. 19-23, 49-55, 58-60, G's Ex. 1A, 1B, 2A-2G, 3A-3B, 4A-4N, 5A-5J, 6A-6I, 19, 20). Defendant usually received the checks in person at the Young Mothers office (T. 57-58).

Although the leases called for renovation to the building to be made by the leasee, the renovations were never completed, and the building was never occupied (T. 108).

The rent monies were deposited into the two above-mentioned bank accounts (T. 186), which were the only records kept for the corporation. Checks were drawn on the checking account to pay for expenses related to the

⁴ On September 30, 1970, a new lease was entered into, with Rugore rather than Ruffin as the lessor (T. 48, G's Ex. 2). Likewise, the two additional leases entered into subsequently show Rugore as lessor.

1402 Bedford Avenue property, as well as for other items. The Government contended that the rent money was reportable as income to the corporation. The Government further contended that the "other" expenditures constituted a constructive dividend⁵ from Rugore to defendant.

IRS records indicated that individual income tax returns had been filed by the defendant for the calendar years 1969 through 1974 (T. 141-143, G's Ex. 18B). The records further indicated that corporate income tax returns for Rugore had been filed delinquently on November 30, 1972, for the calendar years 1970 and 1971; that defendant had claimed that Rugore was not liable to file any return for 1972; that no corporate returns were filed for 1973 and 1974; and that defendant did not reply to IRS notices of inquiry as to those two years (T. 144-148). Each of the individual returns filed by defendant were signed solely by him, and both corporate returns were signed solely by him as president of Rugore (G's Ex. 1C, 2H, 2I, 3J, 3K, 40, 5K, and 6J). No tax preparer's signature appeared on any of the returns.

The Government's proof as to Rugore's and defendant's tax liability established the following: "

⁵ A constructive dividend is any amount of corporate monies which are diverted to the personal use or control of a shareholder of a corporation. *DiZenzo v. C.I.R.*, 348 F.2d 122 (2d Cir. 1965).

"The Government's proof was at variance with the indictment because additional deductions had to be allowed based on defendant's papers, requested in advance of trial, but not produced until the very morning of the trial (T. 188).

Moreover, defendant's contention that the Government arrived at the amounts of taxable income by disallowing "obvious deductions" misstates the record. The Government's case was based upon defendant's utter failure to report almost \$150,000 in income, upon which over \$20,000.00 in taxes was due. This was not an "illegitimate deductions" case.

TAXABLE INCOME (RUGORE ASSOCIATES, INC.) ⁷

	1970	1971	1972	1973	1974
GROSS INCOME PER RETURN	\$ NONE	\$ NONE	NO	NO	NO
LESS: DEDUCTIONS PER RETURN	(3,461.00)	2,168.00	RETURN	RETURN	RETURN
TAXABLE INCOME (LOSS) PER RETURN	(3,461.00)	(2,168.00)	FILED	FILED	FILED
ADD: UNREPORTED RENTAL INCOME	31,200.00	20,700.00	41,200.00	25,000.00	22,500.00
LESS: ADDITIONAL DEDUCTIONS ALLOWED	(3,469.85)	(5,198.59)	(15,876.64)	(7,431.52)	(9,478.45)
CORRECTED TAXABLE INCOME	24,269.15	13,333.41	25,323.76	17,568.48	13,021.55
CORRECTED TAX LIABILITY	5,472.69	2,933.35	5,655.40	3,865.07	2,864.74
TAX LIABILITY PER RETURN	NONE	NONE	NO	RETURNS	FILED
ADDITIONAL TAX DUE	5,472.69	2,933.35	5,655.40	3,865.07	2,864.74

(G's Ex. 25A)

TAXABLE INCOME (WILLIAM RUFFIN) ⁸

	1969	1970	1971	1972	1973	1974
TAXABLE INCOME PER RETURN	8,306.82	12,853.77	12,140.32	13,203.16	17,354.94	20,962.83
OMITTED INCOME (CONSTRUCTION DIVIDEND)	19,144.85	18,766.46	10,129.06	19,471.35	13,577.41	10,783.14
CORRECTED TAXABLE INCOME	27,451.77	30,820.23	22,269.38	32,674.51	30,932.35	31,745.97
CORRECTED TAX	9,188.63	10,144.74	5,596.98	9,783.53	9,031.59	9,373.31
TAX DEFICIENCY	7,454.25	7,524.15	3,119.09	7,018.68	5,071.56	4,236.32

(T. 234-241)

⁷ The defendant's proof as to Rugore's taxable income and tax liability was as follows:

	1970	1971	1972	1973	1974
GROSS INCOME	28,410.96	30,153.53	35,005.14	25,007.00	27,507.47
TAXABLE INCOME	17,615.00	18,196.00	17,071.00	9,597.00	12,235.00
TAX LIABILITY	3,875.00	4,003.00	3,756.00	2,111.00	2,692.00

(T. 515, 521-523)

⁸ The defendant's proof as to his increased individual tax liability was as follows:

	1969	1970	1971	1972	1973	1974
INCREASE IN TAXABLE INCOME (CONSTRUCTIVE DIVIDEND)	790.25	1,000.00	NONE	5,050.00	NONE	3,791.55
INCREASED TAX LIABILITY	217.32	285.97	NONE	1,476.16	NONE	1,369.67

(T. 504-505, 514).

In essence, in each case, the computations of increased taxable income attributable to defendant himself, were based on constructive dividends to defendant, accruing to him by means of diversions of corporate money (T. 242-245, 503, 505). In arriving at the actual amount of diversion to be classified as a constructive dividend, the legitimate business deductions must be subtracted from the amount of money available for diversion (T. 286).

The Government considered a number of expenses, such as mortgage interest and real estate taxes, to be legitimate business deductions. However, the Government considered certain other items of Rugore expenditures, to wit, the purchase of a \$26,000 mortgage in Ruffin's name, payments of bills for another corporation (1410 Bedford Avenue Corporation), payments to Ford Motor Corporation, installment loan payments and a parking violations bureau payment, as monies under defendant's personal use and control and accruing to his benefit. On this basis, the Government classified the amounts of these payments as constructive dividends from Rugore to Ruffin and considered the amounts reportable as income to Ruffin.

The evidence also showed that on the 1970 and 1971 corporate returns, defendant reported "no income" although he took deductions for depreciation, taxes and interest (T. 540-541). Defendant kept no books and records for the corporation other than copies of the leases and the checking and savings accounts, which were in his own name. Although he first spoke with an accountant in 1972 about doing accounting work for him for a real estate entity of his, it was not until 1976, after the IRS had advised him that he was the subject of a criminal investigation, that defendant brought his records to the accountant (T. 445, 465-66). This same accountant had previously done work for him in connection with

another real estate corporation in which he held an interest (T. 468). Finally, his individual return indicated a depreciation deduction for the 1402 Bedford Avenue property in 1969 although he reported no income from that property and reflected rental income from other property (G's Ex. 1C)

C. The Defense Case⁹

Defendant did not testify on his own behalf but relied on two expert witnesses, to wit, an accountant and a tax consultant, as well as several character witnesses to establish his defense. Essentially, his defenses were (1) lack of willfulness in failing to report income and failure to file and (2) insubstantial increased tax liability.¹⁰

Defendant conceded that the rental income should have been reported as income to the corporation. However, he challenged the amount computed as constructive dividends, arguing that the expenditures were either legitimate business expenses related to other property owned by Rugore or were loans from Rugore to individuals and corporations. By correspondingly decreasing the amounts of constructive dividends and increasing the amounts of legitimate corporate business deductions by means of his classification of expenditures from the checking accounts, defendant sought to establish that his increased tax liability was insubstantial.

To support this contention, defendant's accountant testified that certain items of expenditure, namely checks

⁹ Defendant's computations are set out in fns. 7 and 8, *supra* at p. 9.

¹⁰ Of course, the Government must prove, as an element of the offenses, that the additional taxes due and owing are substantial.

to the Ford Motor Corporation, installment loan payments, and a parking violations bureau payment, should be classified as loans even though the records available to the accountant did not reflect that these "loans" were repaid and there were no documents to lend support to this claim (T. 451-452, 456-457). In addition five checks were assumed by the accountant to be checks for the purchase of land by Rugore (T. 455), when in fact the largest part of the money was used to purchase a mortgage investment in defendant's name (T. 590). Finally, the accountant stated that several checks represented loans to another corporation, 1410 Bedford Avenue Corporation, of which defendant was a principal (T. 465). However, Rugore did not own any stock in 1410 Bedford Avenue Corporation (T. 508), and the only documentation to support defendant's contention that these were loans from corporation to corporation were entries on the books of the 1410 Bedford Avenue Corporation (T. 458). These amounts were considered by the Government to be monies within Mr. Ruffin's personal control and use and therefore constructive dividends, whereas defendant had excluded them from his computation of constructive dividends (T. 508-510).

D. The Charge

In an extensive charge, in this complex and often confusing case, the court instructed the jury on the elements of the crimes of tax evasion and failure to file (T. 715-755). As to the definition of willfulness, the court charged that a willful act is one done voluntarily, intentionally and with the specific intent to do something the law forbids; the court stated that willfulness requires a voluntary, intentional violation of a known legal duty (T. 738). The court further charged that "mere negligence, even gross negligence, is not sufficient to constitute

willfulness." (T. 740). He instructed the jury that careless bookkeeping, errors of judgment and failure to obtain competent accounting help do not constitute willfulness (T. 740).

Thereafter, the defendant requested that the court add that careless disregard also does not constitute willfulness (T. 757). The court refused to add the requested language.

On the issue of knowledge of the falseness of the contents of the tax returns, the court charged that if the jury is convinced beyond a reasonable doubt that the defendant signed the returns, they may infer that he had knowledge of the contents of the returns (T. 740). Defendant objected that this charge allowed the jury to unfairly infer criminal intent or knowledge from the fact that he signed the returns (T. 758).

ARGUMENT

POINT I

Appellant's Grand Jury Statements And Subpoenaed Documents Were Legally Obtained.

Appellant claims that his grand jury testimony "along with its fruits" should have been suppressed. Appellant advances this argument upon the presupposition that he was a target of the grand jury in March 1975, and upon the assertion that since he was not warned that he was a target, his statements and documentary evidence were obtained in violation of Fifth Amendment self-incrimination and due process protections and the Sixth Amendment right to counsel.

Appellant's claim that his statements before the grand jury should have been suppressed is moot.¹¹ Although the court ruled that the statements were admissible (H. 124-127), the Government did not put these statements into evidence. Nor can appellant now claim that the documents he produced pursuant to a grand jury subpoena, the so-call "fruits" of his grand jury appearances, should have been suppressed since he did not move to suppress or otherwise exclude them below (H. 107) and has therefore waived any such claim on appeal. Rule 103, F. R. Cr. Proc.

Appellant argued below that his Fifth Amendment Due Process rights were violated and therefore his statements should be suppressed. Now on appeal, claiming that the indictment is also a "fruit" of the grand jury testimony, he extends that argument to require dismissal of the indictment. Appellant did not sufficiently raise this issue below, and it likewise should not now be entertained on appeal.

However, even were appellant's argument to be heard on appeal, it is unsupported by either law or fact. To begin with, appellant cites no case which holds that due process requires the dismissal of an indictment because the defendant had not been warned in the grand jury that he was a target of the investigation. Indeed, an indictment returned by a properly constituted grand jury is not subject to challenge on the ground that it was based on unconstitutionally obtained evidence. *United States v. Calandra*, 414 U.S. 338 (1974); *United States v. Blue*, 384 U.S. 251 (1966); *Lawn v. United States*, 355 U.S. 339 (1958).

¹¹ Even were the argument not moot, the Government's position that appellant was not a target at the time of the questioning is amply supported by the record. See H. 20-25.

As to the use of the grand jury testimony, the Supreme Court has held that grand jury witnesses, including those who are already targets, may be convicted of perjury based on their false grand jury testimony even though they were not advised of the Fifth Amendment privilege against self-incrimination. *United States v. Mandujano*, 425 U.S. 564 (1976); *United States v. Wong*, — U.S. — (1977), 45 U.S.L.W. (May 16, 1977). The Court has not yet decided whether any Fifth Amendment warnings at all are required for grand jury witnesses. *United States v. Washington*, — U.S. — (1977), 45 U.S.L.W. (May 16, 1977). However, the Court has held that where a target was given comprehensive Fifth Amendment warnings although not told that he was a target, his grand jury testimony could be used against him in a subsequent trial for a substantive offense. *United States v. Washington*, *supra*.

The putative defendant in *Washington* was told that he did not have to answer any questions, that anything he said could be used against him and that he had the right to have counsel for consultation and advice. These warnings were found to be adequate to protect the defendant's rights under the Fifth Amendment Self-incrimination and Due Process Clauses. The Court held that "target" warnings are not constitutionally mandated for any grand jury witness. Additionally, the Court held that these warnings eliminated any possibility of coercion or unfairness. The warnings given to appellant on his first and second appearances, which are reproduced as part of the appellant's appendix, are the same as those given to the defendant in *Washington*. Therefore, even if appellant were a target at the time he appeared before the grand jury, his arguments that his statements and documents were obtained involuntarily and that his Fifth Amendment Due Process rights were violated must be rejected, as in *Washington*.

Appellant relies chiefly upon *United States v. Jacobs*, 531 F.2d 87 (2d Cir. 1976), remanded for findings consistent with *United States v. Mandujano*, 425 U.S. 564 (1976), opinion issued, 547 F.2d 772 (1976), *cert. granted*, May 31, 1977, as authority for his contention that the indictment should be dismissed. In *Jacobs*, first decided in February 1976, almost a year after the appellant's grand jury appearances, the court dismissed the perjury count solely on the basis of its supervisory powers in the interest of insuring uniformity of practice in the Eastern District. The court expressly stated that its decision had no prospective effect. *United States v. Jacobs*, 531 F.2d 87, *supra*. It may be assumed that that the Court likewise intended that it have no retroactive effect. It is respectfully submitted that *Jacobs* therefore has no precedential value for this case.

More importantly, *Jacobs* is factually distinguishable from the case at bar. In *Jacobs*, it was conceded that the defendant, unlike here, was a target when subpoenaed. Moreover, the Court found that the government had sufficient independent evidence to indict on the substantive offense and that calling the defendant to the grand jury was a strategic ploy to make conviction on the substantive count easier. *United States v. Jacobs*, 531 F.2d 87, *supra*. In the instant case, apart from the fact that no perjury indictment was brought, appellant was not a target of the grand jury proceedings when subpoenaed; nor was his appearance before the grand jury a ploy in any sense. The record indicates that the Assistant United States Attorneys who questioned him were circumspect with regard to the appellant's rights and that the questions directed at him concerned his business transactions with the program which the grand jury was investigating. Indeed, the court below found that the Government had acted in good faith (H. 124-127).¹²

¹² In addition, the Court rejected any taint claim, finding that the tax case could have been developed independently of the grand jury proceedings (T. 124-127).

One of the Assistant United States Attorneys present in the grand jury at the time of appellant's first appearance testified that appellant had been called solely as a substantive witness in the investigation of the federally-funded anti-poverty program (H. 20, 25-26). Appellant had been subpoenaed to produce documents and leases for the rental of property to the anti-poverty program; no tax returns were called for and no tax case against appellant had been initiated (H. 21-24). The grand jury was investigating, among other things, the disposition of certain funds given to the program. Indeed, the grand jury minutes reflect that appellant was asked seventeen pages of questions about the leasing of property to the program before he was asked about the filing of tax returns (G.J.I.). Less than four of thirty-three pages of testimony concerns Rugore's or appellant's individual tax obligations. Clearly, at this point appellant was not a target. At the conclusion of the questioning, appellant was asked to return on March 14 and to bring certain corporate books and records, corporate tax returns and personal tax returns.

On March 14, appellant again was informed of his Fifth and Sixth Amendment rights and was then questioned only as to corporate activities of Rugore. At this appearance only one question was asked about Rugore Associate's corporate tax returns, which question was simply a repetition of a question asked on March 7, i.e. when the returns were last filed. The vast majority of questions concerned the 1410 Corporation, which formed no part of the indictment. The only questions about personal income concerned appellant's salaries from employment, which also formed no part of the indictment. Before questioning appellant as to personal income tax, the Assistant United States Attorneys brought him before the miscellaneous judge to determine his eligibility for court-appointed counsel. Appellant also stated that he

had tried to retain counsel on his own. He was also warned on March 14 that he had a "tax problem", before he was questioned about his individual taxes (H. 30). After his answers on March 7, his position changed, although he still was not a target. Before he was questioned about personal tax liability, he was warned that "in fairness to him," his answers may implicate him in violations of federal law. Therefore, although he was not told in exact words that he was a potential defendant, he was, in effect, warned of that possibility. Certainly, the defendant was not unaware of the effects his answers might have, and the court found that he was aware that he might be the subject of criminal proceedings (H. 124-127).

The case was then referred to IRS for review, and no decision to prosecute had been made by IRS as late as November 4, 1975, almost eight full months after appellant's grand jury appearances (H. 59-61, 65). Therefore, it is clear that appellant was not a target of a grand jury tax fraud investigation in March 1975, since the case had not been referred to IRS for review and recommendation.¹³ We contend, therefore, that to consider appellant a putative defendant, even on March 14, would require definition of that term that no court has yet given.

In sum, appellant's arguments as to suppression of his statements are moot. As for his arguments pertaining to the fruits of the statements, appellant did not seek suppression of subpoenaed documents; nor did he ask that the indictment be dismissed. The claims have been waived for failure to raise them below. But, the short answer

¹³ Even after IRS makes a recommendation to prosecute, the United States Attorney cannot begin a tax grand jury investigation without approval of the Department of Justice. 26 CFR 0.70.

to these claims is that appellant was not a target of the grand jury investigation when he was called to testify, and after he made what appeared to be incriminatory statements he was given what in effect was a target warning. This fully complied with the "uniformity" rationale of *Jacobs, supra*, and gave appellant greater protection than the constitution requires. *United States v. Washington, supra*.

POINT II

The Evidence Was Sufficient To Support The Verdicts Of Guilty On The Attempted Tax Evasion Counts For The Corporate 1970 And 1971 And Individual 1972 Returns.

Appellant challenges the sufficiency of the evidence under Counts IV, VII, and VIII, all of which charged violations of Title 26, U.S.C., § 7201 (attempted tax evasion). In particular, he argues that there was insufficient evidence to show intent to evade and to establish knowledge of the duty to report the rental income on his individual return.

We contend that viewing the evidence adduced at trial, as the court must, in the light most favorable to the Government, *Glasser v. United States*, 315 U.S. 60 (1942), and construing all permissible inferences in the Government's favor, *United States v. Marchisio*, 344 F.2d 653, 662 (2d Cir. 1965); *United States v. Dardi*, 330 F.2d 316, 325 (2d Cir.), *cert. denied*, 379 U.S. 845 (1964), it was ample for the jury to find that appellant willfully evaded both corporate and individual taxes.

Appellant's evasion covered a five-year period, *Holland v. United States*, 348 U.S. 121 (1954). He was a well-educated man, having taken graduate courses in real estate taxation and accounting (T. 554-5, 562-3), and

he had considerable business experience in real estate through his employment (T. 406) and his involvement in other real estate transactions (T. 452-455). *United States v. Rischard*, 471 F.2d 105 (8th Cir. 1973). Moreover, he personally collected the rent checks which represented the unreported income (T. 57) and which were drafted to him personally, and he deposited them into accounts in his own name (T. 133, 135-7). In addition, appellant was the sole shareholder and officer of the corporation and was in full control of the corporation's affairs (T. 527). Appellant prepared the returns in question and thus was fully aware of their contents. In so doing he understated the corporate taxable income for 1970 and 1971 by one-hundred percent and his personal income for 1972 by over sixty percent. *United States v. Boyer*, 110 F. Supp. 592, 597 (N.D.W. Wa. 1953); *United States v. Glasscott*, 216 F.2d 487 (7th Cir. 1954), *cert. denied*, 348 U.S. 937 (1955). No books or records other than the bank accounts in his name were kept for the corporation (T. 186-188). *United States v. Swallow*, 511 F.2d 514, 520 (10th Cir. 1975); *United States v. Coblentz*, 453 F.2d 503, 505 (2d Cir. 1972), *cert. denied*, 406 U.S. 917 (1972).

Although appellant claimed deductions on the 1970 and 1971 corporate returns, he reported the amount of gross income as "none". Certainly, one need possess no special degree of tax sophistication to know that over \$30,000 per year in rental receipts for property upon which those deductions are based constituted reportable gross income. In 1972, appellant purchased a \$26,000 mortgage in his own name with \$6,705.00 from corporate funds (T. 590); earlier he had purchased an \$8,000 mortgage on the same property in the name of the corporation (T. 591). Yet he failed to report that money, along with other corporate diversions, as income to himself. Again, it does not require special knowledge to realize that this

substantial purchase represented individual income to appellant. Moreover, the money received as rent was not reported on either the corporate or individual returns. Even a person lacking appellant's financial expertise would, and should, realize that this income must be attributable to one entity or another. Interestingly, appellant was knowledgeable enough to take deductions for bad debts and the depreciation of the property and had reported rental income from other property on his individual return (T. 639). Yet appellant now argues that while he was aware of his rights to take deductions and thus lower his tax liability, he was *not* aware of his obligation to report the income received from the property he was depreciating. This argument, we submit, is simply without merit. Finally, if the income had been reported, appellant's individual and corporate tax liabilities would have been substantially increased. Therefore, he had a strong motive to evade taxes.

Based on this evidence, the jury reasonably could have found that with appellant's experience and background, his degree of control over the corporation's income and expenditures, his personal benefit from the corporation's income, his one hundred percent understatement of corporate income for 1970 and 1971, his failure to report any of the income on either the corporate or individual returns, and his failure to keep corporate records, that the appellant knew of his obligation to report and pay taxes on the rental receipts and that he willfully failed to do so.

Appellant further argues that there was no proof that he understood the concept of constructive dividend and knew of his obligation to report such income. Of course, the Government need not prove that the appellant had specific knowledge of the concept of constructive dividend. It is sufficient to adduce evidence from which the jury could find that appellant knew that he had to report

the income and that he had willfully failed to do so. *Sansone v. United States*, 380 U.S. 343, 351-353 (1965); *United States v. Pomponio*, 97 S. Ct. 22 (1976). The purchase of the \$26,000 mortgage in his own name in 1972, after having purchased a smaller mortgage on the same property in the corporate name, together with the loans made from corporate funds to another corporation in which appellant held an interest, were sufficient to support the jury's verdict. It is apparent that the jury found, as the prosecutor argued, that appellant was "no babe in the woods." "

POINT III

The Court's Charge As To Willfulness Was Proper.

In appellant's most puzzling argument, he contends that the court's charge on willfulness was inadequate in that: (1) even though it instructed that mere negligence and gross negligence were not enough to constitute willfulness, the court should also have charged that careless disregard was not enough; and (2) the court failed to

"The appellant also claims that the government failed to produce pursuant to his request during trial certain records of the 1410 Bedford Avenue Corporation, which books he now claims would have lent support to his contention that loans from Rugore to that corporation were validly entered on the 1410 books in 1972 and therefore should be excluded as constructive dividends to appellant. Appellant claims, apparently, that this interfered with his defense of insubstantial tax due and owing. Of course, appellant's own witness testified that the entries as to the loans were made in 1973 and 1974, not 1972 as argued by appellant (T. 467). The court asked the parties to work out the problem of production of the records (T. 468). The record reflects no further discussion of the matter, and no subpoena was served upon the Government for the production of the documents. Moreover, the record simply fails to reveal what prejudice, if any, occurred as a result of the alleged failure to produce documents.

charge that "bad faith" or "evil motive" were necessary for a showing of willfulness.

The charge, in pertinent part, charged as follows:

An act is done willfully if it is done voluntarily and intentionally and with the specific intent to do something the law forbids. That is to say, it connotes a voluntary, intentional violation of a known legal duty. (Tr. 738).

Willfulness in regard to the misdemeanor and felony sections of the Revenue Code does not require proof of evil motive or bad purpose. It requires nothing more than "an intentional violation of a known legal duty." *United States v. Pomponio*, 97 S. Ct., *supra*, at 23-24. In *Pomponio*, the Court reaffirmed its explanation of willfulness set forth in *United States v. Bishop*, 412 U.S. 346 (1973), as requiring only the violation of a known legal duty, and the Court specifically rejected the claim that the word "willfully", as used in the misdemeanor and felony sections of the Revenue Code, requires a finding of bad purpose or evil motive. *United States v. Pomponio*, 97 S. Ct., *supra*, at 23. Furthermore, appellant himself cites *United States v. Pohlman*, 522 F.2d 974 (8th Cir. 1975), *cert. denied*, 96 S. Ct. 766 (1976) as defining willfulness in exactly the manner charged by the district court in this case (Appellant's Brief, p. 23).

The court below further charged:

[M]ere negligence, even gross negligence, is not sufficient to constitute willfulness. A defendant is not willfully evading a tax if it is shown that he is merely careless in keeping his books or if he failed to hire a competent bookkeeper or accountant. (T. 740).

It is difficult to understand, in the face of this language, appellant's claim that this charge allowed the jury to

find that careless disregard is sufficient to constitute willfulness. Apart from the clear language about carelessness or incompetent assistance, the charge requires a finding of culpability exceeding gross negligence, which is clearly a stricter standard than careless disregard. Appellant's argument is, to us, confounding. It is akin to arguing that a jury which has been instructed that it must find more than "a & b & c" to convict must also be instructed that it has to find more than "a".

Almost as a postscript, appellant adds that there was no evidence that appellant knew his legal duty. This argument, of course, goes to sufficiency of the evidence rather than to a claimed defect in the charge. The jury was obviously convinced that if the appellant had enough education and business acumen to file tax returns with deductions for depreciation and other expenses, he knew he had a legal duty to report the rental receipts as income.¹⁵ This was a factual question which the jury resolved against the appellant.

POINT IV

Appellant's Evidence About Useful Life Of The Property Was Properly Excluded.

Appellant's accountant, Jerry Kladerman, had prepared work papers in which he allowed Rugore depreciation deductions based upon a five year useful life for the property owned by Rugore, which had been acquired in 1969 and which the accountant imprecisely described as having been "condemned" in 1974.¹⁶ Appellant's tax con-

¹⁵ Sufficiency of the evidence is discussed in Point II of the Government's brief.

¹⁶ The building was not taken by the City, but rather was classified as uninhabitable by the Department of Buildings of the City of New York.

sultant, Robert Stewart, computed Rugore's corporate and appellant's individual tax liabilities based upon the accountant's five-year depreciation schedule. The Government objected to this evidence as irrelevant and at variance with both generally accepted accounting principles and the rules of the Internal Revenue Service (T. 310). The Government asked for an offer of proof to determine admissibility of this testimony.¹⁷ A voir dire was then held, at which Kladerman testified that he made his calculations for depreciation based on what he knew in 1976, when he prepared his work papers, not on what was known about the building in the year the returns were prepared (T. 357-359). He also testified that if the building were not inhabitable it would have no value (T. 358). Yet this vacant property was rented for \$30,000 per year during this period.

Appellant's tax consultant, Stewart, further testified that if the building were structurally unsound in 1969, then a five-year useful life for depreciation purposes could be justified (T. 351). However, in formulating his opinion, the witness did not take into account the fact that the leases for 1969-1974 called for renovation of the building (T. 351-352).

At the conclusion of the hearing, the court found that the proffered testimony in support of the five-year useful life of the building was inadmissible because it was grounded in incorrect legal premises and because it did not prove what appellant claimed it would. (T. 384). The court stated:

¹⁷ Appellant complains that the court disrupted his orderly defense by holding a "suppression" hearing on this issue. (Appellant's Brief, p. 7). However, the court followed standard procedure in holding a voir dire to determine a preliminary legal question.

The case law seems rather clear that in a prosecution such as we are dealing with, filing fraudulent tax returns, you must look at the facts as they existed at the time that the tax returns were filed.

It is not permissible for the taxpayer to re-evaluate the circumstances and recalculate the tax obligations based upon additional information available after the returns have been called into question. (T. 384).

Indeed, appellant admits in his brief that this is the applicable legal standard. Moreover, this well-established principle was relied on by the government at the voir dire. Internal Revenue Code, Regulations, § 1.167(b)-0 (a). *Commissioner of Internal Revenue v. Cleveland Adolph Mayer Realty Corp.*, 160 F.2d 1012 (6th Cir. 1947); *Commissioner of Internal Revenue v. Mutual Fertilizer Co.*, 159 F.2d 470, 471-472 (5th Cir. 1947).

The court having applied the correct legal test, the only dispute on appeal can be whether the facts known to appellant in 1970, 1971 and 1972, the years upon which his conviction is based, justified a five-year write-off. With respect to this issue the court made the following finding:

There is nothing before me to show that simply because the City of New York refused to permit the building to be occupied as of a given date in 1974 and 1975 that that necessarily renders a building valueless. It may indeed have had no more or less value at that time than it did at the time than it did when the building was originally purchased by the defendant, at which time it also was not fit to be occupied but required alterations, refurbishing before it could be occupied. (T. 384-385).

The question of value is not an automatic function of the question of "condemnation" by the City. (T. 385).

The court thereby ruled that appellant had not produced sufficient evidence that the building was without value at the end of the five-year period, the assumption upon which the five-year useful life was based. It is clear that the court excluded the proffered evidence on the ground that it was simply not probative of that which the defendant sought to establish. A hypothesizing of facts which have no probative basis are irrelevant and incompetent as a defense to the charge. *Clark v. United States*, 211 F.2d 100, 105 (8th Cir. 1954), *cert. denied*, 348 U.S. 911 (1955).

Appellant argues, nonetheless, that the useful life of a building is a question of fact and thus for the jury to determine. But this is not the rule, and, indeed, not every factual determination is for the jury. See Rule 104(a) of the Federal Rules of Evidence, which provides that preliminary questions concerning the admissibility of evidence are to be determined by the Court. And it is hornbook law that questions relating to the competence of the evidence are within the exclusive province of the court. *Weinstein on Evidence*, p. 104-10. Of course, of necessity, questions of admissibility may involve fact-finding by the court. But, if the court determines that the evidence is incompetent, the jury will not be allowed to consider it, and the incidental necessity for the court to resolve a factual dispute does not, automatically, transform the issue into one for the jury. To so hold would in effect, stand the common-law procedure for determining admissibility of evidence on its head. In the instant case, appellant's evidence was properly excluded as irrelevant and incompetent. See, *e.g. United States v. Vardine*, 305 F.2d 60, 64 (2d Cir. 1962).

Alternatively, of course, this evidence can be considered as conditionally relevant. That is, if the building was valueless in 1974 and if the same physical condition prevailed in 1972, then the five-year useful life testimony would be relevant to the issue of allowable deductions. However, since the underlying conditions could not be established, this evidence, which would have been admissible only "subject to connection", was therefore properly excluded under Rule 104(b), Fed. R. Evid.

POINT V

The Rebuttal Testimony Concerning The Contents Of Duly Recorded Mortgages Was Properly Admitted.

On the defense case, appellant's accountant, Kladerman, testified that he categorized certain expenditures by Rugore as related to the purchase of 1418 Bedford Avenue and that this property was a corporate asset; his assumptions were based solely upon explanations made by appellant to the witness (T. 455). Appellant's tax consultant, Stewart, then testified that, in his opinion, the purchase of this property should be treated as an investment by Rugore so expenses for this property would be deductible for the corporation (T. 535, 548). In addition, according to Stewart, the investment by the corporation should not be included as a constructive dividend to the appellant. Appellant's classification of this property as an asset of Rugore had the effect of reducing the tax liability of both the corporation and the individual and was therefore relevant to establishing appellant's "insubstantial tax liability" defense.

On rebuttal, the Government established, through the testimony of Internal Revenue Service Special Agent Edward Hamill, that the investment was not a purchase of *property* but was rather the purchase of \$26,000 and

\$8,000 mortgages on the property with corporate funds, for appellant and the corporation respectively. This evidence therefore supported the Government's theory that appellant had received a constructive dividend, and it rebutted the "insubstantial tax liability" defense. Moreover, this evidence also established that appellant had misled his accountant when he told him that the expenditures were for a purchase of property and therefore tended to rebut his "lack of willfulness" defense. Since this evidence rebutted defense evidence concerning material issues of fact and therefore was within the permissible scope of rebuttal evidence, its admission was not an abuse of discretion. *Sullivan v. United States*, 411 F.2d 556, 558 (10th Cir. 1969), *United States v. Johnson*, 208 F.2d 404, 406 (2d Cir. 1953), *cert. denied*, 347 U.S. 928 (1954).

Appellant also argues that Mr. Hamill, the Government's rebuttal witness, was not qualified to conduct a title search and to testify that the documents reflected an assignment of mortgages rather than a purchase of property. He argues that only a lawyer admitted to practice in New York State could have so testified. Mr. Hamill had received a J.D. degree, but was not admitted to the bar (T. 575). He testified that he had been a Special Agent in the Intelligence Division of Internal Revenue Service for four years, that in the course of his duties as a Special Agent he had had experience with title searches and real estate transactions and also had had such experience while working previously in the Trust and Estate Department of a New York City bank, and that he had searched numerous titles in various counties (T. 575-576). He also described in detail, on voir dire, the exact steps he had taken to search the records he proposed to testify about (T. 577-579). There was also an extensive voir dire on the notes the witness had made during his title search (T. 581-586). In overruling the objection as to lack of qualification, the

court, in effect, found that the witness was qualified by virtue of education and experience to testify about the results of his title search.

Rule 702 of the Federal Rules of Evidence provides that a witness may be qualified as an expert by virtue of "knowledge, skill, experience, training or education." Whether a witness is qualified to testify as to a particular issue is in the discretion of the judge; the judge must also decide whether the testimony will assist the trier of the facts and whether the expert has sufficient acquaintance with the basic facts. *Cranston Print Works Co. v. Public Service Co.*, 291 F.2d 638 (4th Cir. 1961). The court's ruling will not be reversed unless it abuses its discretion. *Hamling v. United States*, 418 U.S. 87, 108 (1974); *United States v. Pacelli*, 521 F.2d 135, 140 (2d Cir. 1975), *cert. denied*, 424 U.S. 911 (1976). In the instant case, the witness testified to a material fact in issue based upon his personal observations of the records about which he testified. The court found that the transactions testified to were "simple, almost elementary real estate transactions" (T. 594). Obviously, the court did not abuse its discretion in allowing this witness to testify.

Appellant attempts to support his contention that the witness was unqualified by citing to cases dealing with the unlawful practice of law in New York State. However, admission to the practice of law is not relevant, we submit, to judging the expert's qualifications here. It is his legal training, experience and education that qualified him. Thus, the fact of admission to the bar is irrelevant and the cited authorities are inapposite.

Appellant also argues that the testimony of the witness was inadmissible hearsay. He contends that the Government had evidence in advance of trial indicating the purchase of the mortgages and therefore had suffi-

cient time to produce copies of the documents. However, it was not until the morning of December 16, in the midst of the defense case, when the appellant's tax consultant testified that those expenditures should be treated as an investment by the corporation rather than by appellant individually, that the Government was made aware of the need to rebut this testimony. The Government then made an attempt at the luncheon recess to secure copies of the mortgage assignments but would have been unable to do so for several days (T. 567-570).

The court found that the documents were unavailable, that there was no surprise to appellant's counsel, who stated that they also had had the title searched (T. 567), and that rather than delay the trial for several days the evidence would be admitted and a recess would be taken for the express purpose of allowing defense counsel to examine the records before beginning cross-examination (T. 572). In fact, after the recess (T. 595-597), the defense counsel in conducting cross-examination, was allowed, over objection, to pose questions containing assertions of fact which were not in evidence (T. 603-609). Appellant thereby was permitted to present to the jury, without taking the stand, his version of what the documents reflected. Consequently, we submit that the admission of this testimony, if error at all, was harmless.

The court in its ruling did not specifically cite Rule 803(24), Fed. R. Evid., which provides for a general exception to the hearsay rule, in that, hearsay is admissible if it has circumstantial guarantees of trustworthiness when offered as evidence of a material fact, if the statement is more probative than any other evidence the proponent can procure through reasonable efforts, and if the purpose of the rules of evidence and interests of justice would be served by allowing it in.

We submit that these standards were fully met, as described above. Moreover, the rule also calls for sufficient advance notice to the adverse party, to allow him a fair opportunity to prepare to "meet it." In the instant case, since the issue was only joined on the morning of the day the rebuttal evidence was offered and since the appellant was familiar with the facts about which the witness would testify and was given sufficient opportunity to prepare for cross-examination, this requirement was met. Accordingly, we submit that notwithstanding the fact that Rule 803(24) was not specifically cited, its requirements were fully complied with. Hence, the evidence was properly held to be admissible, and the appellant was not unfairly prejudiced by its admission.

POINT VI

The Internal Revenue Service Computer Printouts Containing Taxpayer Information Were Properly Admitted.

Appellant claims several errors with respect to the admission into evidence of Government's Exhibits 18A and 18B, which were Internal Revenue Service computer print-outs relating to the corporate and individual taxpayers. These print-outs contained various codes which reflected information received by the Internal Revenue Service concerning a particular taxpayer such as dates of filing, dates of communications, etc. Specifically, appellant now complains of one specific entry on the corporate print-out, which reflected a statement made by appellant to Internal Revenue Service, which was to the effect that the corporation was not required to file a 1972 tax return. The argument is that this entry and testimony interpreting it should not have been allowed into evidence unless the identity of the Internal Revenue

Service employee who received the communication was disclosed. In essence, as we understand it, appellant seems to be arguing that he could not effectively cross-examine the expert witness through whom this document was introduced without knowing who actually collected the information.

At the close of the pre-trial suppression hearing, four days before the trial began, the Government asked for a ruling as to the admissibility of the documents in question. The Government offered the documents pursuant to Rules 902 and 1005 of the Federal Rules of Criminal Procedure; the documents were certified as true and complete transcripts of the taxpayers' accounts (H. 134-136). These computer print-outs were therefore self-authenticating and were properly admissible as such. Appellant's only objection at this time was that the certification did not specifically identify the documents as Internal Revenue Service documents (H. 135).¹⁸ Moreover when the documents were offered into evidence at trial, they were only objected to on the basis of irrelevance (T. 140). Appellant's arguments that (1) no proper foundation was laid for the admission of the documents and (2) the documents are inadmissible hearsay, have been waived for purposes of appeal. Rule 103(a), Fed. Rules of Evid.

The Internal Revenue Service tax examiner, Wayne Martin, who was called to interpret the exhibits testified about the entries thereon, including a code 590 entry, which the witness explained reflected a statement from Ruffin that Rugore was not liable to file a corporate tax return for 1972. (T. 145). Appellant never asked that

¹⁸ At trial Wayne Martin, an I.R.S. employee, identified them as Internal Revenue Service documents (T. 140).

the testimony with regard to that entry be stricken from the record and did not object to the testimony on that point in any way (T. 145, 168-170). Absent plain error, he therefore has waived his right to object for the first time on appeal to the admission of the testimony as to that entry, Rule 103(a), Fed. Rules of Evid.

After the witness was excused, appellant called for the production of the document, i.e. the letter or memorandum of phone call, upon which the code 590 entry was based (T. 167-168). Appellant's counsel explained that appellant claimed never to have made such a statement (T. 169-170). Counsel admitted that appellant was planning to take the stand and would deny making such a statement (T. 169-170). The court ruled that inasmuch as the statement was not in possession of the United States Attorney's Office and it would take months to get it, and inasmuch as the defendant would testify in contradiction to the Government's evidence, it would be impractical to require production of the document (T. 169-170).

The court can exclude relevant evidence for reasons of delay. Rule 403 of the Federal Rules of Evidence. This determination will not be disturbed on appeal unless it amounts to an abuse of discretion, which this decision certainly was not.

Even if appellant were not deemed to have waived his objections to this evidence, the record demonstrates adequate guarantees of trustworthiness. Mr. Martin, who was called to interpret the contents of the print-outs, was familiar with the nature of the records and the contents therein. He testified that he had done in-depth study of taxpayer records and in the past four and a half years had been translating the codes on the taxpayer records into layman's language (T. 139). The witness identified

the documents as Internal Revenue Service transcripts of appellant's individual income tax accounts and the corporate income tax accounts for Rugore, in care of William Ruffin, which transcripts recorded payments, charges, credits and other transactions (T. 140). The witness thereafter interpreted the entries on the documents and was able to answer each question put to him.

Appellant states that the witness was unable to explain the procedure for preparing the code 590 entry on the exhibit. On the contrary, the witness testified that code 590 means that the taxpayer had informed Internal Revenue Service that Rugore was not liable to file a corporate tax return for calendar year 1972 (T. 145). He further testified that that communication from the taxpayer could come in the form of a telephonic or written reply (T. 151), although he could not tell from this document in which form it had been received, and that it would have been received at the Brookhaven Service Center, Holtsville, New York (151-52). He testified that the documents reflecting that communication would be coded into the computer (T. 152) and then sent to the Federal Records Center, Bayonne, New Jersey (T. 161). Clearly, the defendant's testimony demonstrated the reliability of the records and entries thereon.

Appellant's suggestion that only the recipient of information entered into official documents can testify as to the contents of the documents is frivolous. This argument completely ignores the purpose of the official documents hearsay exception, which is to eliminate the need to produce the recipient.

Finally, of course, the questioned entry related that the appellant claimed that no tax return need be filed for the corporation for calendar year 1972. Not only was appellant not convicted for failure to file a return

or to evade corporate taxes for calendar year 1972, but the statement is arguably exculpatory. No prejudice could have befallen appellant from testimony as to his statement.¹⁰ Error, if any, in admitting this testimony was harmless.

POINT VII

The Court's Charge On Knowledge Of The Contents Of The Returns Was Correct.

Appellant argues that in charging the jury on the element of "willfully attempting to evade or defeat the tax due and owing with specific intent to defraud the Government", the court, in essence, instructed the jury that if the defendant signed the tax returns, then he had knowledge of the falseness of the contents. He also argues that the instruction compelled a finding of fact that appellant knew the contents of the returns.

The court's charge on this subject was as follows:

As to whether the defendant was aware of the contents of his personal returns and of the tax returns pertaining to income of Rugore Associates, you are instructed that the law is if you are further convinced beyond a reasonable doubt that the defendant, William Ruffin, signed the tax

¹⁰ Appellant also claims that the documents reflecting his statement should have been produced as part of Rule 16 discovery material. However, the statement was not in the possession of the United States Attorney's Office (T. 169), and there has been no showing that it could have been obtained in time for trial by due diligence, assuming that it was discoverable under Rule 16. Moreover, appellant does not claim that his defense would have been different in any way had he known about the statement before trial.

returns in question, then you may draw the inference to find that he had knowledge of the contents of the return (T. 740).²⁰

The plain meaning of this charge is that if the defendant signed the return, he knew the contents of the return. It in no way implies that the defendant also knew that the contents were false.

An undisputed signature on a return, as in the instant case, is *prima facie* proof of knowledge of the contents, *United States v. Tolkow*, 532 F.2d 853, 857 (2d Cir. 1976), *United States v. Romonow*, 505 F.2d 813 (1st Cir. 1974), and the jury need have nothing more than a defendant's signature to infer he read the return, *United States v. Romonow*, *supra*, 505 F.2d at 815.

When viewed in the context of the proof adduced at trial, appellant's claim appears even more frivolous. The evidence at trial established that appellant alone prepared all the tax returns in question. No preparer's signature appeared on the returns (T. 347, G's Exs. k, 2H, 21, 3J, 3K, 40, 5K, 6J), and the proof that appellant had prepared the returns was uncontroverted. It is therefore axiomatic that appellant, who prepared the returns, knew the contents thereof.

Moreover, the charge, when read as a whole, makes clear that the jury must find other grounds in addition to the signature to conclude that the defendant knew the contents of the return were false. Additionally, the fact that the jury acquitted the defendant on two counts weakens any claim that the jury automatically inferred knowledge of the falseness of the returns.

²⁰ This charge is virtually identical to the standard instruction in *Federal Jury Practice and Instructions*, 2d Ed., Devitt and Blackmar, ¶ 52.14.

Clearly, in the instant case, the instructions left the finding of knowledge of the contents of the returns within the province of the jury. The charge in no way took away from the jury any part of the fact-finding process. The cases cited by appellant which hold that the court cannot compel a finding of fact are therefore inapposite.

CONCLUSION

The judgment of conviction should be affirmed.

Dated: June 3, 1977

Respectfully submitted,

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BERNARD J. FRIED,
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Of Counsel.*

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AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss

BERNARD J. FRIED being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 6th day of June 1977 he served a copy of the within

BRIEF FOR APPELLEE

by placing the same in a properly postpaid franked envelope addressed to:

CORA T. WALKER, ESQ. 270 Lenox Avenue, N.Y., N.Y. 10027

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, 225 Manhattan Plaza East, Borough of Brooklyn, County of Kings, City of New York.

Bernard J. Fried

Sworn to before me this

6th day of June 1977

Carolyn N. Johnson

CAROLYN N. JOHNSON
NOTARY PUBLIC State of New York
No. 41-46182-8
Qualified in Queens County
Term Expires March 30, 1979